In the Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 429.

FRED BARDES, TRUSTEE OF THE ESTATE OF FRANK T. WALKER, BANKRUPT, - *Complainant*,

vs.

FIRST NATIONAL BANK OF HAWARDEN, IOWA, THE BANK OF ALCESTER, OF ALCESTER, SOUTH DAKOTA, AND CHAS. R. ALLEN, - - - *Defendants*. } IN BANKRUPTCY.

QUESTIONS CERTIFIED.

1ST. DO THE PROVISIONS OF THE SECOND CLAUSE OF SECTION 23 OF THE ACT OF CONGRESS KNOWN AS THE BANKRUPT ACT OF 1898, CONTROL AND LIMIT THE JURISDICTION OF ALL COURTS, INCLUDING THE SEVERAL DISTRICT COURTS OF THE UNITED STATES, OVER SUITS BROUGHT BY TRUSTEES IN BANKRUPTCY, TO RECOVER OR COLLECT DEBTS DUE FROM THIRD PARTIES, OR TO SET ASIDE TRANSFERS OF PROPERTY TO THIRD PARTIES ALLEGED TO BE FRAUDULENT AS AGAINST CREDITORS, INCLUDING PAYMENTS IN MONEY OR PROPERTY TO PREFERRED CREDITORS?

2ND. CAN THE DISTRICT COURT OF THE UNITED STATES UNDER ANY CIRCUMSTANCES ENTERTAIN JURISDICTION OVER SUITS BROUGHT BY TRUSTEES IN BANKRUPTCY TO

SET ASIDE FRAUDULENT TRANSFERS OF MONEY OR PROPERTY MADE BY THE BANKRUPT TO THIRD PARTIES BEFORE THE INSTITUTION OF PROCEEDINGS IN BANKRUPTCY?

3RD. CAN THIS COURT, BEING THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, TAKE JURISDICTION OVER THE SUIT AS IT NOW STANDS ON RECORD?

4TH. IF THE COMPLAINANT SHOULD DISMISS THE SUIT, AS TO THE DEFENDANTS LIVING IN IOWA, THUS MAKING IT A SUIT BETWEEN CITIZENS OF IOWA ON THE ONE HAND AND CITIZENS OF SOUTH DAKOTA ON THE OTHER, AND INVOLVING OVER $2,000 EXCLUSIVE OF INTEREST AND COSTS, WOULD JURISDICTION EXIST IN THIS COURT?

The questions here presented have been considered by the district courts of the United States in the following cases, and after a full discussion the decision is there reached that the district court as a court of bankruptcy has jurisdiction to hear and determine cases of this character:

In re Severs, 91 Fed. R., 366. (Affirmed by Circuit Court of Appeals and reported under title *Davis* v. *Bohle*, in 92 Fed. R., 325.)
In re Brooks, 91 Fed. R., 508.
Carter v. *Hobbs*, 92 Fed. R., 594.
In re Newberry, 97 Fed. R., 24.

We feel that we can add little to the able and exhaustive reasoning of these learned courts. The same question is also considerd *In re Gutwillig*, 90 Fed. R., 481, where the court held that the court of bankruptcy has jurisdiction to enjoin the assignee of the bankrupt from disposing of or interfering with the property transferred to him under the assignment, pending the hearing on the petition in bankruptcy. This decision was affirmed by the Circuit Court of Appeals, Second Circuit, 92 Fed. R., 337.

It is true some of the district courts have held that a court of bankruptcy has not jurisdiction in such suits, but in most of those cases the exact question here raised was not before the court for determination. The question *In re Abraham*, 93 Fed. R., 767, relied upon by counsel for defendants, is not whether a trustee in bankruptcy can by bill in equity bring suit in the district court to set aside fraudulent conveyances of the bankrupt to third parties, in pursuance of the trustee's duty to "cause the estates of bankrupts to be collected, reduced to money, and distributed," but whether the court has jurisdiction by summary proceedings, seizure of goods and rule entered against a purchaser at assignee's sale, to compel him to appear in court in ten days and establish his right to the goods, or failing to do so be decreed to have no right thereto. The appellate court very properly decided it has no such jurisdiction. Any other determination would be confiscation, the taking of property without due process of law. The purchaser was entitled to his day in court, and the burden of establishing title to the property was not upon the purchaser in possession, but upon his creditors seeking the possession.

If the express terms of article b, section 23, do not absolutely prohibit the district court denying itself jurisdiction, as to whether it has jurisdiction or not, may be debated. If, however, the plain and express provision of article b does so prohibit, nothing else in the act can be considered whether relevant or not. We think the language of article b is sufficiently ambiguous or indefinite as to leave the matter open for construction, and therefore the rule of examination of the whole law to ascertain the real intendment is applicable.

It is provided in section 2 of the act that district courts have such jurisdiction at law and in equity as will

enable them to exercise original jurisdiction in bankruptcy proceedings, "to cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided." The allegations of the bill, which are admitted by the demurrer, are to the effect that the property or money which it is sought to recover from defendants is a part of the bankrupt's estate. This suit is an effort to collect this estate and reduce it to money for distribution among the creditors. If the district court as a court of bankruptcy is powerless to assist the trustee in these endeavors, what is the meaning of the language used in this section? If this suit is heard upon its merits then a controversy will have arisen in relation to the collection of this estate. What force has the provision conferring jurisdiction to determine controversies if the court cannot hear and determine such controversies? The exception, as has been clearly pointed out in the cases cited, manifestly refers to section 23, which admits the jurisdiction of the court under certain limitations. If it was not intended to give the district court general jurisdiction in cases of this kind, why was the *express* limitation placed upon the circuit court by the first paragraph of section 23? Such limitation was unnecessary unless to make clear the distinction between the general jurisdiction of the district court and the limited jurisdiction of the circuit court, as section 23 leaves the circuit court with exactly the same jurisdiction it had before the passage of the act. To give the circuit court jurisdiction under the act there must be diversity of citizenship and sufficient amount in controversy, but such was already the law. The cases we have cited from the district court hold that the second clause of section 23 is a limitation upon the circuit court only. If a limitation

upon the district court, what good reason can there be for holding that it is not also a limitation upon the state courts? The bankrupt could not have prosecuted suits of this character in any court, and the obvious conclusion then is that no court in existence has jurisdiction of such a suit.

Section 23 distinguishes "controversies at law and in equity" from "proceedings in bankruptcy." This makes it plain that the term "bankruptcy proceedings," as used in section 2, was intended to have a general application to all matters and suits arising under the act, including suits by the trustee, and a specific meaning as used to denote the mere administrative acts connected with a bankrupt estate. The duties of a trustee in bankruptcy are partly administrative and partly as a suitor in court. Most of the subdivisions of section 2 refer to administrative acts in the settlement of a bankrupt estate, while clause 7 can be construed to refer to nothing unless to suits brought by the trustee. The word "controversies" must there be used in the same sense as in section 23.

It is of course admitted that the state courts likewise have jurisdiction of suits by the trustee, but this is no reason why the Federal district court has not also jurisdiction of suits of the same class. In the great majority of suits over which the circuit court has jurisdiction, in fact in all cases where diversity of citizenship and amount in controversy only are necessary to confer jurisdiction, the state courts have the same jurisdiction if the plaintiff chooses to submit his controversy to them.

If it is a fact that no provision is made by the bankruptcy act for appeal in suits between the trustee and a third person, it cannot affect the jurisdiction of the district court, and does not in a remote degree indicate that

such litigation was not contemplated. Section 2 confers upon the district court all powers in law and in equity necessary to an exercise of jurisdiction, and the last clause of said section provides that: "Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated." While sitting as a court of bankruptcy and determining controversies arising on a creditor's bill, the district court is a court of equity, and as such appeals from it may be taken as from any court exercising the same powers. Section 6 of the act of March 3d, 1891 (26 stat., 326), confers upon the circuit court of appeals appellate jurisdiction to review by appeal or writ of error final decision in the district court in all cases other than those otherwise provided for. If, because no provision was made for appeal by the bankruptcy act, the district court has not jurisdiction, then for the same reason the circuit court would be deprived of jurisdiction, even in cases coming within the provisions of section 23. The jurisdiction of the district court is admitted when the consent of the defendant is secured, but the objection of counsel, if valid, would apply with the same force to such condition.

Section 23 provides for appeals from certain administrative acts of the courts of bankruptcy, while section 24 confers appellate jurisdiction in other bankruptcy proceedings upon the courts already possessing appellate powers. Again, it is clear from the reading of the first paragraph of section 24 that the word "controversies" is there used in the same sense as in the 7th clause of section 2, and refers to suits for the collection of the estates of bankrupts as provided by said clause 7. Section 24 then *distinctly provides* for appeals in suits brought by the trustee in the district court. It can have no reference

to cases within the jurisdiction of the circuit court, for it mentions only "controversies arising in bankruptcy proceedings from the courts of bankruptcy," and the district court is the only court of bankruptcy. It cannot refer to appeals from the administrative acts of the courts of bankruptcy, for they are provided for by section 25. What controversies are then contemplated by section 24 unless those arising in suits to "cause the estates of bankrupts to be collected, reduced to money and distributed?" It is fair to assume that if such litigation in the Federal court had not been contemplated, the right of appeal would not have been provided.

We call the Court's attention to section 26.

Arbitration of Controversies.

"Art. a. The trustee may, pursuant to the direction of the court, submit to arbitration *any* controversy arising in the settlement of the estate."

"b. Three arbitrators shall be chosen by mutual consent, or one by the trustee, one by the other party to the controversy and the third by the two so chosen, or, if they fail to agree in five days after their appointment, the *court* shall appoint the third arbitrator."

"c. The written finding of the arbitrators or a majority of them, as to the issues presented, may be filed in *court* and shall have like force and effect as a verdict of a jury."

Arbitration may be had in any controversy. This cause may be arbitrated. The method is fully provided by which the arbitrators may be selected. The district court of the United States is doubtless the court which is referred to in section 26 with relation to arbitration, because the arbitrators are to all intents and purposes a "jury," and their finding on being filed in court a verdict. Could a state court act in a matter of arbitration

under this statute? If United States district courts sitting as courts of bankruptcy have jurisdiction to arbitrate *any* controversy arising between its trustees and any other person "in the settlement of the estate," was it the intention to exclude it from jurisdiction of the same controversy in law or equity?

By section 27 the trustee may, with the approval of the court, compromise *any* controversy arising in the administration of the estate, upon such terms as he may deem for the best interests of the estate.

What court gives this approval? If it is the United States district court as a court of bankruptcy, why should it have jurisdiction to *compromise* "any controversy" and yet have no jurisdiction to *try* any controversy? Especially if it was the intent of the legislature to give exclusive jurisdiction to state courts in *some* controversies. All necessary rules, forms and orders as to procedure and for carrying this act into force and effect shall be prescribed by the Supreme Court of the United States.

Section 36.

Is this procedure for carrying this law into full force and effect for the state courts? Marshaling the assets of an estate in bankruptcy is carrying the act into force and effect. If to do so third parties have a controversy with the trustee, is the bankruptcy court helpless to enforce the legal rights of its officers?

By this act, referees have the power to take possession of the property of the bankrupt.

Article 3, section 38.

The trustee upon his appointment and qualification is vested by operation of law, with the title of bankrupt

as of the date of the adjudication of all property which prior to the filing of the petition he could by any means have transferred, including such property as has been transferred in fraud of creditors.

Section 70.

The transfer of the property from bankrupt Walker to the defendants as alleged was in fraud of his creditors within the meaning of said section. All property transferred with intent to defeat the operation of the bankruptcy law is of necessity in fraud of creditors.

The property of bankrupt Walker, on his being adjudicated a bankrupt, became vested in the trustee after the latter had qualified, including the property conveyed to the defendant banks. This property was then *custodia legis.*

"Property conveyed by a bankrupt in fraud of creditors, prior to the passage of the bankrupt law, is to be regarded as vested in the assignee in bankruptcy by force of that act, and by virtue of proceedings thereunder."

Goodwin v. *Sharkey*, 5th Abb. Prac. (N. S.), 64.

By the demurrer, defendants admit that the bankrupt's property was transferred to them in fraud of creditors and in contravention of the provisions of the bankruptcy law. The court of bankruptcy then has the right of custody of this property by reason of the title thereto being vested in its officers. Is there anything in article b, of section 23, prohibiting the district court from drawing to its possession, property of which its officer has title, and which by operation of law it is entitled to distribute, by the admissions of the defendants in filing this demurrer?

Under the law of 1867 it was held that "suits by an assignee in bankruptcy are excepted from the general

rule that Federal courts have no jurisdiction of controversies between citizens of the same state, and this exception included a suit by such assignee against a person not a party to the proceedings in bankruptcy."

Atkinson v. *Purdy*, Fed. Cas., No. 316.

"A bill by an assignee in bankruptcy to set aside a fraudulent conveyance by the bankrupt is a case arising under the constitution and laws of the United States, of which the Federal courts have jurisdiction irrespective of the citizenship of the parties."

Woolridge v. *McKenna*, 8th Fed. Rep., 650.

"The Federal courts have jurisdiction over a plenary suit against the assignee in bankruptcy to assert a claim of superior title to property of the bankrupt fraudulently assigned."

Olney v. *Tanner*, 10th Fed. Rep., 101.

"The Federal court of bankruptcy has exclusive jurisdiction to adjudicate between the assignee and any person having a claim against the estate."

In re Anderson, 23d Fed. Rep., 482.

"The district court of the United States has exclusive jurisdiction of all controversies between the assignee and the bankrupt depending on his relation as such."

Carr v. *Gale*, Fed. Cas., 2434.

"The district courts of the United States have original jurisdiction of all cases and controversies between third persons and an assignee in bankruptcy as such."

Backman v. *Packard*, Fed. Cas., 709.

"The district court of the United States has full power as a court of equity to settle all controversies between the bankrupt and his creditors."

Fowler v. *Dillon*, Fed. Cas., 5000.

Where there is an admission, as in this case, for the purposes of this hearing, that the title to the property is vested in the officer of the district court, and the district court is entitled to the same, does the present bankruptcy act require the officer of that court, under such conditions, to resort to the state tribunal for the purpose of securing the bankruptcy court that which the defendants concede by this demurrer that court is absolutely entitled to? It seems impossible that there was any such legislative intent in the enactment of the law.

The moment that an adjudication of bankruptcy has been made, the title to all the property of the bankrupt, as of that date, passes to the person who is subsequently chosen trustee. From the time of the adjudication the property of the bankrupt is in the custody and under the control of the bankruptcy court. From the time such property, by the adjudication of bankruptcy, comes into the custody of the bankruptcy court, it is in *custodia legis.*

Keegan v. King, et al., 96th Fed. Rep., 758.

"This is a suit to set aside a contract upon grounds created and established by an act of congress, the bankrupt law. Such a suit is a suit arising under the laws of the United States and this court has jurisdiction. The Federal courts are the appropriate tribunals for the trial and hearing of such cases and as the rights of the parties rest upon the provisions of the laws of the United States, the parties have the right to the decision of the Supreme Court of the United States, upon them."

Main et al., v. Glen, 7th Biss., 86, or Federal Cases No. 8, 973.

"Under the bankrupt law of 1841 the United States district courts had jurisdiction of all matters and proceedings arising under it and of all suits at law or in

equity to be brought by the assignee or any person claiming an adverse interest."

Chemung Canal Banks v. Judson, 8th N. Y., 254.

In suits under the bankrupt law, the United States courts have exclusive jurisdiction.

Voorhies v. Frisbie, 25th Mich., 476.

The trustee in bankruptcy on being duly selected and qualified, takes the title to the bankrupt's estate. While further proceedings may be necessary to actual, manual, possession of it, he has instantly something more than a lien, he has the title. As the trust under which the trustee holds the title to the property can not be performed except the trustee reduce the property to actual possession and dispose of the same under the decree of the United States district court, such court has jurisdiction of a suit to obtain possession of that which its officer holds title.

Olney v. Tanner, et al., Federal Cases No. 10,506.

Under the bankruptcy law of 1867 the assignee was held to be vested with the title to all property conveyed by the bankrupt in fraud of creditors, and it was held that he might recover the bankrupt's interest in the same whether or not any creditor was in position to attack the transfer.

Platt v. *Matthews*, 10th Fed. Rep., 280.

It was also held that under the law of 1867 the assignee in bankruptcy was vested with the title to all property of the bankrupt conveyed in fraud of creditors, and that it was not necessary to entitle said assignee to maintain a suit that he have actual possession of the property.

Lehman v. La Forge, 42d Fed. Rep., 493.

It was also held under said law of 1867 that an

assignee in bankruptcy under the United States bankrupt law was not merely vested with the remedies of creditors as to property fraudulently transferred but with the ownership of such property, and that he might bring an action as such owner to reduce the same to possession.

Mann v. Flower, 25th Minn., 500.

In re Litchfield, 13th Fed. Rep., 863, it was held:

"The assignee is an officer of the court and his possession is the possession of the court. The rule is the same as in cases of receivers."

The court in this same case also states the law as follows: "Indeed, the power of the district court to wind up bankrupt estates, unfettered by the interference of state courts, has been strongly asserted by this court, and I have seen no reason to change my views in that regard. To make a bankrupt law effectual there must be a court specially authorized to administer it. If assignees are bound to go from county to county, defending their rights to different parcels of an estate, the whole administration of the law might as well be vested in the state courts. It is no disrespect to those courts to say that the want of harmony in their decisions, which would inevitably result, would go far towards destroying the efficiency of the system. It is almost as important that the administration of the law should be uniform, and subject to the guidance of one supreme court, as that the law itself should conform to the constitutional requirement of uniformity. Hence, an exceptional power is given to the district courts in bankruptcy cases to enjoin proceedings in the state courts—a power which has never been questioned since the decision of the Supreme Court in Ex parte Schwab, 98th U. S., 240."

We believe one good reason for permitting such controversies in the Federal court to be that which gives the right to citizens of another state or of a foreign country to have their controversies determined in the Federal court, removed from the local influences and prejudices of the state courts. In the vast majority of cases arising under the bankruptcy act the creditors are widely scattered, many of them, if not the greater number, being citizens of a different state from the bankrupt. It is necessarily so in the commercial world in which more than nine-tenths of bankruptcy cases arise. It is said in *Carter* v. *Hobbs*, *supra*, that "The trustee stands in the place of the creditors of the bankrupt, and has the same rights and may pursue the same remedies in their behalf as they had or would have been entitled to if there had been no adjudication of bankruptcy." Under a condition which makes a bankruptcy law necessary or expedient the sympathies and prejudices of people for their unfortunate neighbors in business are uncommonly excited, and the law making power wisely considered the importance of having the forum in which to try cases arising under the act removed from this influence. If the bankruptcy court has no jurisdiction in such cases it is shorn of power to accomplish one of the very objects of its creation. It would be a strange act indeed, which created a court having power merely to administer the details of a bankrupt estate, a power almost wholly given over to an appointee of the court, and turned over to the state courts the important matters of litigation necessary for the preservation, collection and distribution of the bankrupt estate. It is logical and proper that a trustee should have the right to bring suit in the court to which he owes his creation. If there is doubt as to the meaning of any part of the Act, that part should

be so construed as to give force to the Act as a whole, and not deprive it of its principal share of vitality. It is proper to consider the results of a construction when the construction is itself in doubt, but we believe such an interpretation can be given the Act as a whole as will give the district court jurisdiction of this cause without repugnance to any part of the Act.

Respectfully submitted,

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